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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEBORAH JEAN BELL,

Defendant and Appellant.

E047591

(Super.Ct.No. FWV800309)

OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight
III, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and
Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Deborah Bell guilty of forgery (Pen. Code, § 470, subd. (d), count 1),¹ grand theft (§ 487, subd. (a), count 2), and second degree burglary (§ 459, count 3). A trial court placed her on probation for three years, under certain terms.

On appeal, defendant argues that the trial court erroneously proceeded with the trial in her absence, and thereby denied her constitutional rights to due process and confrontation of witnesses. She also contends that her trial counsel was ineffective for failing to object to proceeding with trial in her absence. We affirm.

FACTUAL BACKGROUND

At trial, Alma Monsalvo and Berta Acevedo, employees at the Cardenas Market (the market), testified about the market's check cashing procedures. The first time a person comes in to cash a check, he or she must provide a home and work telephone number, and a valid identification issued by the government. Then, the market employee takes the person's photograph and fingerprints. All of the information is entered into the market's computer system. When registered customers return to the market to cash a check, the market employee scans their fingerprints to confirm their identity. Defendant was registered in the market's check cashing system, as she had provided the required information on August 27, 2007.

Monsalvo testified that on November 9, 2007, defendant came to the market and presented a check in the amount of \$2,999.99 purportedly made by the GATX

¹ All further statutory references will be to the Penal Code unless otherwise noted.

Corporation (the check). After confirming defendant's identity by scanning her fingerprints and looking at her photograph on file, Monsalvo cashed the check. The check was subsequently returned to the market as a fraudulent check.

At trial, Rory Snyder, a vice president at the GATX Corporation, testified that GATX never issued the check to defendant, and that the check number was not in the series of checks the corporation was using at that time.

Defendant testified on her own behalf and admitted that she cashed the check at the market. She said she received the check in the mail from Money-Op Shoppers as part of a job offer to be a mystery shopper. The letter that came with the check instructed her to cash the check, use some of the money as a mystery shopper and evaluate a business, and send the rest of the money to a person listed on the letter. Defendant said she accepted the job offer but admitted that she never worked as a mystery shopper or sent any of the money to anyone. Instead, she lost the money by gambling it away in Las Vegas.

Defendant admitted to the police that she felt the job offer was possibly "a big scam" and that the check was "a fake." Nonetheless, after she cashed the check, she did not contact the authorities.

ANALYSIS

Defendant Was Not Prejudiced by Her Absence from a Portion of the Trial

Defendant was absent the second day of her trial due to medical problems. She now argues the trial court denied her constitutional right to be present at her trial, and

such denial violated her rights to due process and to confront witnesses. We conclude that defendant was not prejudiced by the absence at trial for one day.

A. Relevant Background

Defendant was present in court on the first day of trial, when the jury was selected. However, the next morning she did not appear in court. Out of the jury's presence, defense counsel informed the court that defendant had called her office that morning stating she was not feeling well, her blood pressure was high, and her ankles were swollen. Defendant was under a doctor's care for high blood pressure. She called her doctor, who told her to take her blood pressure at 11:00 a.m. and call him back. Defense counsel stated she informed defendant of the options, which included proceeding with the trial in her absence or letting the jury panel go for the day and resuming the trial the following day. Defense counsel acknowledged that letting the panel go for the day would inconvenience a prosecution witness who had flown in for that morning only to testify. Defense counsel informed the court that defendant was willing to have the trial proceed in her absence. The prosecutor responded that he did not think having high blood pressure should keep a person from coming to court. The prosecutor argued that defendant had voluntarily "absconded" from the proceedings, and that since everyone else was in court that day, they should proceed.

The court did not doubt the accuracy of any of defense counsel's representations but noted there was no medical evidence before it indicating that defendant could not be in court that day. The court further noted that prosecution had flown in a witness for the day, and the trial was on a "tight time frame." The court found that defendant had

“voluntarily absented herself” and decided to proceed with the trial. The court also issued a bench warrant for \$10,000 and stated that it expected defendant to appear the next morning with a doctor’s note indicating she was unable to attend court that day.

In defendant’s absence, three prosecution witnesses testified. Rory Snyder of the GATX Corporation testified that GATX was an equipment leasing company, not a mystery shopper network, and that the company’s records showed it had not issued the check to defendant. Employees of the market testified about the market’s check cashing procedures. They also testified that defendant was registered in the check cashing program and that she had cashed the \$2,999.99 check.

Defendant returned to court the next day with medical records from Corona Regional Medical Center. The court found that the records were valid proof of defendant’s medical problems the previous day and therefore recalled the warrant. The court continued with the trial.

B. There Was No Prejudice to Defendant

“A defendant has the right, under the Sixth Amendment of the federal Constitution, to be present at trial during the taking of evidence. [Citations.] Nonetheless, as we have concluded, ‘as a matter of both federal and state constitutional law, . . . a capital defendant may validly waive presence at critical stages of the trial.’ [Citation.] . . . [¶] Statutory error is another matter. Section 977, subdivision (b)(1), states in pertinent part that ‘[i]n all cases in which a felony is charged, the accused *shall* be present’ at various times during the process, including ‘during those portions of the trial when evidence is taken before the trier of fact . . .’ (Italics added.) That

subdivision further provides that “[t]he accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present” (*People v. Jackson* (1996) 13 Cal.4th 1164, 1209-1210.) Section 1043 further provides that “a felony defendant ‘shall be personally present at the trial’ [citation], but that the trial may continue in the defendant’s absence if (1) the defendant persists in disruptive behavior after being warned [citation]; (2) the defendant in a *noncapital* case is voluntarily absent [citation]; or (3) the defendant waives his right to be present pursuant to section 977 [citation].” (*People v. Davis* (2005) 36 Cal.4th 510, 531 (*Davis*).)

Here, defendant did not execute a written waiver of her right to be personally present; however, her trial counsel did represent to the court that defendant was willing to let the trial go forward in her absence. In deciding to proceed with the trial, the court found that defendant had voluntarily absented herself, since defense counsel did not present any evidence that defendant was prevented from appearing at trial that day due to a medical condition. In referring to a “voluntary absence,” the court clearly had section 1043 in mind. Given the lack of evidence of defendant’s medical condition the day she failed to appear, the court appears to have properly proceeded with the trial. However, the court subsequently found that the medical records defendant brought to court the next day were valid proof of her condition. In light of this finding, it is difficult to say that defendant voluntarily absented herself.

In any event, if the court erred in proceeding with the trial in defendant’s absence, the error was harmless. Defendant initially argues the error was so fundamental that it

constituted structural error requiring automatic reversal. We disagree. A structural error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 (*Arizona*); *People v. Gray* (2005) 37 Cal.4th 168, 233, fn. 20).) “The Supreme Court ‘has recognized that most constitutional errors can be harmless.’ [Citation.] Only in those limited cases where the constitutional deprivation affects ‘the framework within which the trial proceeds,’ is the integrity of trial process so compromised that the ‘criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.’ [Citation.]” (*Hegler v. Borg* (1995) 50 F.3d 1472, 1476.)

Here, defendant has failed to explain or demonstrate how her absence from one day at trial affected the framework within which the trial proceeded, or, in other words, “[t]he entire conduct of the trial from beginning to end.” (*Arizona, supra*, 499 U.S. at pp. 309-310.) She claims the error was structural because she was absent during “virtually all of the evidence used to convict her of the charged violation.” However, the prosecution presented the testimony of three more witnesses—the market’s office manager, the investigating police officer, and a fingerprint analyst—on the day defendant returned to court. Moreover, the prosecution relied heavily upon defendant’s own testimony to convict her. In his closing argument, the prosecutor reminded the jury that defendant admitted she thought the check might be fraudulent, but she cashed it anyway; then, instead of doing any mystery shopping or sending the money back to the company as she was allegedly instructed to do, she spent the money in Las Vegas. Thus, contrary

to defendant's claim, it appears that most of the evidence used to convict her was not presented in her absence. (See also, *post.*)

Defendant further concludes that the court's error was structural because it "so undermined [her] rights to due process, to present a defense, and to confront and cross examine witnesses, and so deprived her of the right to confer with and be effectively assisted by her counsel." In contrast to her claim, courts have held that the denial of a defendant's right to be present during criminal proceedings is a trial error, amenable to harmless error analysis. (*Hegler v. Borg, supra*, 50 F.3d at p. 1477; *Arizona, supra*, 499 U.S. at pp. 306-307; *Davis, supra*, 36 Cal.4th at pp. 532-533.)

"Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23. [Citations.] Error under sections 977 and 1043 is state law error only, and therefore is reversible only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." [Citations.]'" (*Davis, supra*, 36 Cal.4th at pp. 532-533.)

Defendant then asserts that, even if the court's error is reviewed under the *Chapman* standard, reversal is required. She claims the *Chapman* standard places the burden on the prosecution to demonstrate beyond a reasonable doubt that the error was harmless. She argues that this burden is impossible for the prosecution to overcome in this case, because "it is simply unknowable how the trial might have been different had it been recessed for one day so that [she] could be present." She similarly states, "There is no way even to estimate reasonably the effect of her involuntary absence on the workings

and result of the trial.” First, defendant is mistaken. *She* has the burden of demonstrating that her absence prejudiced her case or denied her a fair trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) Second, her own argument demonstrates that she cannot meet this burden.

We conclude the error here was harmless under any standard. None of the testimony during the few hours defendant was absent concerned the disputed issues. The only issues in dispute were whether defendant knew the check was fraudulent at the time she cashed it and whether she entered the market with the intent to commit theft. During the portion of the trial that defendant missed, employees of the market testified about the market’s check cashing program. Furthermore, one of the employees testified that defendant was the person who had cashed the \$2,999.99 check. At trial, defendant admitted that she had enrolled in the market’s check cashing program and that she had cashed the check at the market. Thus, identity was not at issue. The only other witness who testified that day was Rory Snyder, a vice president at GATX Corporation. He simply testified that GATX never issued the check to defendant, and that the check number was not in the series of checks the corporation was using at that time.

Defendant’s presence on the day of these testimonies would not have changed the trial’s outcome. Moreover, the court properly informed the jury that defendant was not present in court due to medical issues, and that the jury was not to consider her absence in any respect. Therefore, any error in proceeding with the trial in defendant’s absence was not prejudicial.

Defendant additionally argues that she was prejudiced the next day at trial, when the court overruled her hearsay objection and allowed a police officer to testify about one of the market employee's prior identification of defendant as the perpetrator. However, given that identity was not an issue, there was no prejudice.

Finally, defendant contends that her trial counsel provided ineffective assistance of counsel by failing to object to the court proceeding in her absence. Since any error in proceeding with trial in defendant's absence was harmless, defendant cannot show that her trial counsel's failure to object caused her prejudice. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) Thus, her claim of ineffective assistance of counsel fails.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.